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No. 08-1280

IN THE

Supreme Court of the United States

RONALD MIKOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

BARRY LEVENSTAM,
Counsel of Record
APRIL A. OTTERBERG
KAIJA K. HUPILA
JENNER & BLOCK LLP
330 N. Wabash Ave.
Chicago, Illinois 60611
(312) 222-9350

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Attorneys for Petitioner

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ARGUMENT

I. The Government's Response Illustrates Why This Court Should Specify The Standard For Determining Whether A Prosecutor's Comments Have Violated A Defendant's Fifth Amendment Right Not To Testify.

The Government attempts to avoid the first Question Presented by disassembling its closing argument to minimize the impact of its statements concerning Mikos's decision not to testify. This attempt must fail. In fact, the prosecutor specifically argued to the jury that Mikos "doesn't have to say a word. He does not have to tell you where that gun is. But this is not a game of hide-and-go-seek." (Pet. App. G, 66a.) These words repeatedly focus the jury's attention squarely on the fact that Mikos did not testify. Twice the prosecutor pointed out specifically that Mikos did not "say" or "tell" the jury something; this argument simply does not focus on conduct, as the Government suggests. The prosecutor's next sentence mentions the "game of hide-and-go-seek," a game in which a person hides *himself* – not an object – from another. The plain thrust of this comment, too, is that Mikos is hiding from the jury rather than testifying to it.[1] Surely the

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[1] Significantly, the court below concluded that this hide-and-go-seek argument represented the prosecutor's "efforts to hold [Mikos's] *conduct* against him" only after *omitting* from its description of the argument the two preceding sentences, *i.e.*, that Mikos "doesn't have to say a word. He does not have to tell you where that gun is." (*Compare* Pet. App. A, 7a (court's emphasis), *with* Pet. App. G, 66a.)

prosecutor could have argued that Mikos hid a gun many ways without highlighting his courtroom silence.

Turning to the law, the Government inadvertently but powerfully demonstrates the need for this Court's guidance. It acknowledges that in *United States v. Cotnam*, 88 F.3d 487, 497 (7th Cir.), *cert. denied*, 519 U.S. 942 (1996), the Seventh Circuit propounded "a test for applying the *Griffin* [*v. California*, 380 U.S. 609 (1965)] rule that the Seventh Circuit has employed in some other cases." (Opp. 12.) Yet the Government immediately admits that "whatever the merit of the test, the court below did not invoke it or rely on any decision that did so." (*Id.*) That is emblematic of the disarray in the law applying *Griffin*, and therefore precisely the point: the court below did not apply its own test, or for that matter, any discernible test, in evaluating the constitutionality of the prosecutor's argument. Nor did the court (or the Government) offer a simple word of explanation as to why the court ignored *Cotnam* in a capital case with Mikos's life on the line. (*See* Pet. App. A, 7a.)

The court's fleeting discussion of the *Griffin* issue described the argument as the prosecutor's "efforts to hold [Mikos's] conduct against him." (*Id.* (emphasis omitted).) This reasoning may be an attempt to assess the prosecutor's intent in making the argument, which is the first part of *Cotnam*'s two-part test. But the court below never addressed the second, far more significant part of the *Cotnam* test: the impact of the prosecutor's argument on the jurors deciding whether Mikos was guilty. 88 F.3d at

497. Indeed, the court below never discussed how the jury would understand the prosecutor's statement that Mikos "doesn't have to say a word. He does not have to tell you where the gun is." (*See* Pet. App. A, 6a-7a.)

Nowhere does the Government contend that any court anywhere has devised an adequate test for assessing whether a prosecutor's statement violates *Griffin* and the Fifth Amendment.[2] The Government uses the fact that the court below did not even apply its own test under *Cotnam* to dodge not only the blatant inadequacies of that test, but also the disarrayed state of the law under *Griffin*. The unprincipled, standardless decision below reflects this disarray, though, and while it provides less protection for Fifth Amendment rights than *Cotnam*, even *Cotnam* is fatally flawed. First, *Cotnam* does not address how the two parts of its test interact, or what to do if they point in different directions. Second, *Cotnam* condemns only statements that the jury would "*necessarily* take ... to be a comment on the defendant's silence." 88 F.3d at 497 (emphasis added). This unduly lax standard means that many statements that juries could and do take as comments on defendants' silence will work their unconstitutional harm and yet escape remedy.

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[2] In a footnote the Government observes that *Portuondo v. Agard*, 529 U.S. 61 (2000), *United States v. Hasting*, 461 U.S. 499 (1983), and *Baxter v. Palmigiano*, 425 U.S. 308 (1976) "do not address the issue relevant here." (Opp. 12 n.2.) This is correct. Although these cases do discuss the outlines of the *Griffin* rule, none sets a standard for evaluating whether a particular statement violates that rule. That, again, is precisely why review is appropriate here.

Finally, the Government simply ignores Mikos's proposal that "an appropriate test – in keeping with this Court's jurisprudence – would ask whether there is a 'reasonable probability' that the jury understood a prosecutor's statement to refer to the defendant's silence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995)." (Pet. 13.) The Government's silence on this point speaks volumes – just as the prosecutor's repeated reference to Mikos's silence on the topic of the gun spoke unconstitutional volumes to the jury.

The Court should grant certiorari to devise a test that will enforce the *Griffin* ban on prosecutorial argument regarding defendants' exercise of their Fifth Amendment rights not to testify.

II. The Government's Response Demonstrates The Need For This Court To Articulate The Standards Applicable To The Appointment Of Experts To Defend An Indigent Defendant In A Capital Case.

The Government has sidestepped the second Question Presented: whether courts in capital cases have a heightened obligation under 18 U.S.C. § 3599 or the Due Process Clause to ensure that an indigent defendant has the assistance of an expert with the particular expertise that appointed counsel reasonably has requested and needs to defend the case. The Government does not point to any precedent from this Court – or any court – addressing the standards applicable to this issue. Nor does it dispute Mikos's contention, preserved below, that, in violation of due process, the

Government's FBI agent-expert provided the jury with a junk science conclusion that Mikos's missing gun could have fired the bullets found in the victim. This Court's recent ruling in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009) that scientific and forensic analyses are not inherently "neutral," "reliable," or "immune from the risk of manipulation" demonstrates the importance of this Question in capital cases.

The Government speculates – without any record support – that LaMagna and Nixon were equally capable of defending Mikos's interests against the Government's superior resources. The attorneys the district court appointed to represent Mikos in this capital case reached the contrary conclusion and so informed the court on the record. (10Tr.2117-18.) The Government relied heavily on the FBI's GRC database to establish that Mikos's gun *could have* fired the bullets recovered at the scene. (Pet. 15-17.) LaMagna, not Nixon, had the particularized knowledge and experience to analyze and rebut this seriously flawed conclusion; LaMagna, not Nixon, had published on the very topic at issue concerning analyzing toolmarks on fired bullets; LaMagna, not Nixon, was familiar with and critical of the FBI's database; LaMagna, not Nixon, has gone on record attacking this type of ballistics and toolmarks analysis as junk science – and earned a citation in the National Academy of Sciences publication for it. (Pet. 15-16 & n.4); *see Melendez-Diaz*, 129 S. Ct. 2536 (noting the National Academy's discussion of "problems of subjectivity, bias, and unreliability of common forensic tests such as ...

toolmark and firearms analysis"). An expert may have stellar credentials and be perfectly competent to testify about certain subjects in a broad field, but that expert still must possess the *precise* expertise to counter a Government expert. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

The Government and the court below argue that Mikos did not make an offer of proof as to how LaMagna would have testified. (Opp. 14; Pet. App. A, 12a.) They demand the impossible: Mikos could not make such an offer of proof because he was not allowed to retain LaMagna. (Pet. 16-17.) But LaMagna's publication made plain his view that Agent Tangren's testimony was not science at all, and that should suffice.

Moreover, the Government's assertion that the district court appropriately denied Mikos's request for LaMagna because his costs would have exceeded the presumptive $7,500 limit on expert funds misses the point. (Opp. 13-15.) The $7,500 limit is presumptive only and may be exceeded. The real standard by which the court's refusal to pay LaMagna's travel expenses should be measured is provided by Section 3599 and due process, which require some leveling of the playing field. *See Ake*, 470 U.S. at 76-77; *cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993). Here, the district court's refusal to approve funds for LaMagna because he lived in Massachusetts – when the Government brought in not one but *three* East Coast experts to address gun-related issues – was exceedingly arbitrary and unfair. Properly interpreted, Section 3599 and due process should not

permit a conviction in a capital case to stand where the defense is placed at such an insurmountable disadvantage. This Court should grant certiorari to answer the second Question Presented.

III. This Court Should Grant Certiorari To Address The Issue Specifically Left Open In *Mitchell v. United States* – Whether The Fifth Amendment Prohibits Using A Defendant's Silence To Prove The Aggravating Factor Of Lack Of Remorse.

This case squarely presents the issue this Court left open in *Mitchell v. United States*, 526 U.S. 314, 330 (1999): "[w]hether silence bears upon the determination of a lack of remorse" as a sentence-enhancing factor. By answering that question with an unqualified "yes" – indeed, by approving the argument that Mikos "showed no remorse" merely because he never took the stand to apologize – the court below has virtually eliminated the Fifth Amendment's protections from capital sentencing. (Pet. App. A, 26a.) Indeed, the court's decision gives unrestricted license to the Government to argue the lack of remorse aggravating factor in *any* case where the defendant does not tell the jury he is sorry. This Court should address *Mitchell*'s open issue now to reaffirm that the Fifth Amendment does not stop protecting a defendant at the very stage when he needs it most – when a jury is deciding whether he should live or die.

The Government recognizes the sweeping nature of the flawed holding below and implicitly concedes that penalty-phase argument calling

attention to Mikos's silence would violate the Fifth Amendment. (Opp. 17-19.) Nonetheless, it seeks to excuse the prosecutor's argument by asserting that it addressed Mikos's "affirmative conduct" or in-court "demeanor," not his silence. (*Id.* (emphasis omitted).) But *everything* on which the Government relies to demonstrate Mikos's supposed unremorseful "affirmative conduct" concerns the Medicare fraud, *not* the murder. As the dissent below recognized, conduct relating to the *fraud* cannot establish lack of remorse *as to the murder*. (Pet. App. A, 34a.)

The Government's in-court demeanor argument also fails. The Government does not even attempt to argue (it has no basis to do so) that Mikos's demeanor was anything out of the ordinary for a defendant who chose not to testify yet to be present to assist in his defense. That destroys any distinction – assuming there is one – between Mikos's "demeanor" and his "silence." "The non-reaction the government [claims as] 'demeanor' evidence is not an action or a physical response, but a failure to speak." *United States v. Velarde-Gomez*, 269 F.3d 1023, 1031 (9th Cir. 2001) (en banc). "Whether the government argues that a defendant remained silent or describes the defendant's state of silence, the practical effect is the same – the defendant's right to remain silent is used against him at trial." *Id.* at 1032.

Again, there is simply no question that the prosecutor here directly and specifically asked the jury to infer from Mikos's silence that he had no remorse for the murder, and told the jurors that they could use that silence as a reason to sentence Mikos

to death: "He's sitting 20 feet away from you and there's nothing, no remorse whatsoever .... [H]e's sorry he got caught, but he's not sorry that he shot Joyce Brannon. The only ramification of that as he's sitting opposite you right now, nothing else in this man's heart, not a single thing. He has no remorse for what he did." (Pet. App. H, 71a-73a.) The natural, common-sense, and "only inference" jurors could draw from this argument was that if Mikos were sorry for the murder, he would have taken the stand and said so, not stayed silent sitting 20 feet away from them. (Pet. App. A, 35a.)

The Government also misreads *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir.), *cert. denied*, 543 U.S. 842 (2004) and *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir.), *cert. denied*, 502 U.S. 898 (1991) (both cited Opp. 19-20; Pet. 21). In *Beardslee*, the court of appeals held that the prosecutor's penalty-phase "reference to the jury not being 'able to observe' whether 'there was any feeling in the man' contrast[ed] the actual trial with a hypothetical one in which the defendant testified" and therefore violated the Fifth Amendment. 358 F.3d at 586-87. Because the *Beardslee* defendant had offered some testimony, however, albeit through prior statements, the prosecutor *could* comment to some extent on the defendant's demeanor *while testifying*. *See id.* By going beyond only that and affirmatively inviting the jury to penalize the defendant for not testifying in front of them – as Mikos's prosecutor did here – the *Beardslee* prosecutor violated the Fifth Amendment. Similarly, in *Lesko*, 925 F.2d at 1544-47, the court of appeals reversed a defendant's death sentence, on

habeas corpus review, after holding that the prosecutor violated the Fifth Amendment by arguing that the jury should penalize the defendant for failing to say he was sorry when he provided other sentencing-phase testimony. Both of these cases prove Mikos's point: if silence-related argument violates the Fifth Amendment when the defendant has provided some testimony, then certainly similar argument when a defendant (like Mikos) does *not* testify *at all* must also violate the Fifth Amendment.

In addressing the other cases Mikos cited to demonstrate the need for this Court's review, the Government fails to show any uniformity or coherence among the courts on using silence to prove the lack of remorse aggravating factor. Rather, the Government merely establishes that lower courts do require guidance on *Mitchell*'s open issue – particularly in cases where the defendant, like Mikos, decides to remain silent throughout the proceedings. Indeed, the Government cites no case establishing a test for deciding when argument on the lack of remorse factor may violate the Fifth Amendment.

The Government also dismisses Mikos's citation to a number of other federal appellate decisions, claiming that none of them "address[] the question of when prosecutorial comment to a jury concerning a defendant's lack of remorse crosses the line into *Griffin* error." (Opp. 21.) Here, the Government seeks to narrow Mikos's third Question Presented to focus on improper prosecutorial argument. But this Question Presented (and the issue left open in *Mitchell*) is broader: the issue is whether a

defendant's silence can be used, in *any* way – including but not limited to prosecutorial argument – to show the lack of remorse aggravating factor. That the court, rather than the Government, committed the constitutional error in some of the cases Mikos cites does not diminish the existence of varying views on the evidentiary value – or lack thereof – of silence to prove lack of remorse.

Furthermore, in giving short shrift to Mikos's state cases (which also demonstrate diverging views on *Mitchell*'s open issue), the Government once again proves Mikos's point. The Government argues that Mikos's cases "merely stand for the proposition that, where a defendant has maintained his innocence throughout the proceedings, his sentence may not, consistent with his Fifth Amendment privilege, be based on his mere failure to express remorse at sentencing or at trial." (Opp. 22.) Mikos agrees. A defendant's mere failure *to express* remorse should never be used to demonstrate *a lack* of remorse and to justify imposing the death penalty – but that is exactly what happened here, with the lower court's approval.

Finally, the Government incorrectly contends that Mikos "does not take issue with" the holding below that the prosecutor's unconstitutional argument was mere "harmless error." (Opp. 23.) Mikos vigorously contests that conclusion; he seeks this Court's review precisely because the unconstitutional use of his silence against him significantly influenced the jury's decision to impose a death sentence. Without Mikos's silence, jurors could not have found lack of remorse beyond a

reasonable doubt, as the dissent below recognized. (*Id.* at 30a-31a, 38a-40a.) Nor did the weighing of aggravating and mitigating factors clearly favor death; jurors credited numerous mitigating circumstances. By inviting jurors to penalize Mikos for his silence, the Government unconstitutionally tipped the balance toward death. Given the "acute need for reliable decisionmaking when the death penalty is at issue," *Deck v. Missouri*, 544 U.S. 622, 632 (2005), the bare speculation of the Government and the court below that the lack of remorse factor did not affect the sentence is utterly insufficient.

The Government has bolstered Mikos's argument that this Court's review is necessary to get the court below – and those other state and federal courts that have allowed prosecutors or courts to use silence to establish lack of remorse – back in line with *Griffin* and the Fifth Amendment. A defendant's silence simply has no bearing on the lack of remorse inquiry, and it violates the Fifth Amendment most fundamentally to use that silence to justify the imposition of the harshest possible sentence under the law. In *Mitchell*, this Court left this issue to another day; after ten years, the day to resolve this issue has come, and this is the case.

CONCLUSION

This Court should grant Mikos's Petition for Writ of Certiorari.

Dated: September 1, 2009 Respectfully submitted,

Barry Levenstam,
Counsel of Record
April A. Otterberg
Kaija K. Hupila
Jenner & Block LLP
330 N. Wabash Ave.
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Petitioner